93

FILED
MAY 23 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

C3

No. 07-1329

In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

RONALD CURTIS CHAMBERS,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

GREG ABBOTT
Attorney General of Texas

EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

KENT C. SULLIVAN
First Assistant
Attorney General

*ELLEN STEWART-KLEIN
Assistant Attorney General
Postconviction Litigation Division

ERIC J. R. NICHOLS
Deputy Attorney General
For Criminal Justice

P.O. Box 12548, CapitolStation
Austin, Texas 78711-2548
(512) 936-1400

* Counsel of Record

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The Director's Harmless-error Argument Is Properly Presented for Certiorari Review and is Not Waived. 2

II. The Question Presented Has Relevance Well Beyond the Context in which It Is Raised. 5

CONCLUSION 8

TABLE OF AUTHORITIES

Cases	Page
Abdul-Kabir v. Quarterman, 127 S. Ct. 1654 (2007)	1
Arizona v. Fulminante, 499 U.S. 279 (1991)	7
Ascota v. Artuz, 221 F.3d 117 (2nd Cir. 2000)	4
Batson v. Kentucky, 476 U.S. 79 (1986)	6
Brecht v. Abrahamson, 507 U.S. 619 (1993)	passim
Brewer v. Quarterman, 127 S. Ct. 1706 (2007)	1
Caspari v. Bohlen, 510 U.S. 383 (1994)	3, 4
Chapman v. California, 386 U.S. 18 (1967)	2
Chrones v. Pulido, 128 S. Ct. 1444 (2008)	7
Clemons v. Mississippi, 494 U.S. 738 (1990)	7
Dandridge v. Williams, 397 U.S. 471(1970)	4
Day v. McDonough, 547 U.S. 198 (2006)	4
Estelle v. Smith, 451 U.S. 454 (1981)	6
Fry v. Pliler, 127 S. Ct. 2321 (2007)	7, 8
Granberry v. Greer, 481 U.S. 129 (1987)	3, 4
McClesky v. Zant, 499 U.S. 467 (1991)	3

TABLE OF AUTHORITIES, continued

Cases	Page
Mitchell v. Esparaza, 540 U.S. 12 (2003)	7
Nelson v. Quarterman, 472 F.3d 287 (5th Cir. 2006) *(en banc)* (2007)	2, 6, 7
Penry v. Lynaugh, 492 U.S. 302 (1989) ("*Penry I*")	1, 5, 6
Ring v. Arizona, 536 U.S. 584 (2002)	7
Rose v. Clark, 478 U.S. 570 (1986)	2
Satterwhite v. Texas, 486 U.S. 249 (1988)	7
Schiro v. Farley, 510 U.S. 222 (1994)	4
Smith v. Texas, 127 S. Ct. 1686 (2007) (*Smith II*)	6
Smith v. Texas, 543 U.S. 37 (2004)(per curiam) (*Smith I*)	6
Teague v. Lane, 489 U.S. 288 (1989)	2, 4
Trest v. Cain, 522 U.S. 87 (1997)	3, 4
United States v. Hastings, 461 U.S. 499 (1983)	2
United States v. Mechanik, 475 U.S. 66 (1986)	5
Yates v. Evatt, 500 U.S. 391 (1991)	2, 3

TABLE OF AUTHORITIES, continued

Cases **Page**

Statutes, Constitutions, and Rules

28 U.S.C. § 2244(a) 3

U.S.C. § 2254(b)(c) 3

Mere days before Chambers's long-awaited execution date, this Court granted certiorari and stayed his case in light of the litigation in *Abdul-Kabir*[1] and *Brewer*,[2] yet again revisiting the issue of when *Penry* error[3] occurs. After deciding those cases, this Court remanded Chambers's case for reconsideration. The lower court interpreted this remand as instructions to reverse, finding structural constitutional error and refusing to consider the Director's argument that any error was harmless. But granting relief because there is a possibility a jury was unable to fully consider Chambers's scant evidence of poverty is at odds with both this Court's habeas and *Penry* jurisprudence. Further, even on the remote chance the jury was somehow precluded from considering some of Chambers's evidence, where *Penry* error would result in a new sentencing trial after *thirty-three years,* the interests of justice certainly warrant application of the *Brecht*[4] standard. As demonstrated below, this issue is preserved for review, even though this Court's precedent does not require affirmative habeas defenses to be preserved. Furthermore, the impact of this ruling is far greater than Chambers asserts. For these reasons, this Court should grant certiorari review.

---

1 *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007)

2 *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007).

3 *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*").

4 *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

I. The Director's Harmless-Error Argument Is Properly Presented for Certiorari Review and Is Not Waived.

Contrary to the arguments of Chambers, the Director did not waive a harmless-error defense. The defense was presented and argued in the court below. Director's Brief (after remand) at 22-28. The lower court did not find, or even suggest, that the argument had been waived. But the lower court was precluded from addressing it by the en banc decision in *Nelson v. Quarterman*, 472 F.3d 287, 314-15 (5th Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 2974 (2007). Further, Chambers's suggestion that the Director should have argued harmless error when there was no error under current law requires a level of foreseeability, this Court has never required.

Whether or not the Director previously raised harmless error is immaterial because it is well within a federal court's discretion to raise harmless error *sua sponte*. *See Yates v. Evatt*, 500 U.S. 391, 407 (1991) ("[W]e have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance.") (citation omitted); *Rose v. Clark*, 478 U.S. 570, 584 (1986) ("[W]e 'plainly have the authority' to decide whether, on the facts of a particular case, a constitutional error is harmless under the *Chapman* standard.")[5] (citing *United States v. Hastings*, 461 U.S. 499, 510 (1983)).[6] Although this Court cautioned that reviewing records to determine harm should be done "sparingly," (*Id.* at 510

---

[5] *Chapman v. California*, 386 U.S. 18 (1967).

[6] *Cf. Teague v. Lane*, 489 U.S. 288, 300 (1989) (addressing retroactivity despite the fact that it was raised only in an amicus brief).

(citations omitted)), the Court has made equally clear that the primary concern should be, and is, judicial economy. *Yates*, 500 U.S. at 407 ("Because this case has already been remanded twice, once for harmless-error analysis, we think we would serve judicial economy best by proceeding now to determine whether the burden-shifting jury instructions were harmless.").

More importantly, the unique concerns underlying federal habeas review must be considered. AEDPA was specifically enacted to prevent abuses and delays in habeas corpus litigation. It has specific and strictly enforced rules regarding successive petitions and exhaustion. *See* 28 U.S.C. §§ 2244(a), (b); 2254(b), (c). These rules were crafted to ensure piecemeal litigation was a thing of the past and to prevent petitioners from being in charge of the litigation, deciding when and how to bring their claims into federal court. Judicial economy and fairness, respect for the state courts, comity and the importance of a final judgment all played into the enactment of this legislation. *E.g.*, *McClesky v. Zant*, 499 U.S. 467, 489-93 (1991). These concerns have guided this Court's rulings on whether a federal court may apply an affirmative defense –exhaustion, non-retroactivity, procedural default– not raised by the State or, alternatively, consider such a defense raised for the first time on appeal. *See Granberry v. Greer*, 481 U.S. 129, 133 (1987) (federal appellate courts have discretion to consider the issue of exhaustion *sua sponte*); 28 U.S.C. § 2254(b)(3) (same); *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (federal courts may *sua sponte* raise the issue of *Teague* non-retroactivity); *Trest v. Cain*, 522 U.S. 87, 90 (1997) (recognizing that courts of appeals have all held that a procedural default may be raised *sua sponte*). Additionally, this Court has recognized that the State is

"entitled to rely on any legal argument in support of the judgment below," even arguments not presented to the lower courts. *Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) (citing *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970)).

This Court recently reaffirmed the reasoning of *Granberry*, *Caspari*, and *Trest*, and held that a federal court may *sua sponte* apply AEDPA's statute of limitations against a habeas petitioner where the State has failed to do so, as long as: (1) the parties are accorded notice and an opportunity to address the issue; (2) the petitioner is not prejudiced by any delay; and (3) the interests of justice are served. *Day v. McDonough*, 547 U.S. 198, 210-11 (2006). The *Day* Court explained that the statute of limitations "'promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments while the record is fresh, and lends finality to state court judgements within a reasonable time.'" *Id.* at 205-06 (quoting *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)).

The *Brecht* harmless-error standard rests on the same policy justifications as exhaustion, non-retroactivity, procedural default, and limitations. Namely, "the State's increased interest in the finality of convictions," comity, and federalism during collateral review. *Brecht*, 507 U.S. at 635. Thus, a federal court should be permitted to *sua sponte* raise harmless error in any case in which it might also raise exhaustion, non-retroactivity, limitations, or procedural default where the *Day* factors are satisfied. In fact, the state court found this error to be harmless on direct review. *Chambers v. State*, 903 S.W.2d at 34-35. In this sense, Chambers has been on notice of a harmless-

error argument since 1995. Finally, as in *Day*, nothing in the record suggests that the Director "strategically withheld the defense or chose to relinquish it" in this case. 126 S. Ct. at 1684.

Where *Penry* error would result in a new sentencing trial after *thirty-three years*, the interests of justice certainly warrant application of *Brecht*. Granting habeas relief after so long merely because there is a *reasonable likelihood* the jury's verdict was negatively affected by a now-repealed sentencing statute "is at odds with the historic meaning of habeas corpus — to afford relief to those whom society has 'grievously wronged.'" *Brecht*, 507 U.S. at 637. Such a decision has significant social costs, "including the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' that accompany the passage of time and make ... retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice.'" *Id.* (quoting *United States v. Mechanik*, 475 U.S. 66, 72 (1986)). Therefore, the interests of justice — finality, comity, and federalism — strongly favor consideration of whether any *Penry* error had a "substantial and injurious effect" on the verdict. *Id.*

II. The Question Presented Has Relevance Well Beyond the Context in which It Is Raised.

Despite Chambers arguments to the contrary, the question of whether *Penry* error is amenable to a harmless-error analysis is not a narrow one. It should not be considered solely in the context of those few remaining Texas-death-row inmates that may be affected by this Court's *Penry* jurisprudence. It should not be

brushed aside simply because the lower court's opinion is unpublished. Rather, the question should be considered, as the Director asserted in his petition, because the lower court's reasoning is fundamentally at odds with this Court's rulings. Furthermore, even if this case was the only one affected by the lower court's erroneous ruling (which it certainly is not), the State's interest in pursuing justice for a man thrice convicted and sentenced to death for the brutal beating death of another, is not something this Court should take lightly.[7]

In *Nelson*, the court of appeals determined that the because the jury-charge error at issue arose in the context of a death-penalty trial —and thus involved a "moral judgment"— it is structural error subject to automatic reversal. 472 F.3d at 314-15. But the reasoning of *Nelson* finds no support in this Court's precedents. First, *Penry* error is nothing more than jury-charge error. *See Smith v. Texas*, 127 S. Ct. 1686, 1699 (2007) (*Smith II*)(Alito, J., dissenting) ("The federal constitutional error that occurred in the penalty phase of petitioner's trial and that was identified in *Smith v. Texas*, 543 U.S. 37 [] (2004) (*per curiam*) [], concerned a

---

[7] In footnote six, Chambers disagrees with the Director's characterization of his previous grants of relief as mere technicalities. Brief in Opp at 17. Specifically, he asserts that both were the result of prosecutorial misconduct. *Id.* The Director vehemently denies such misconduct on the part of the prosecutors. As the Director noted in his petition, Chambers was granted relief on the basis of *Estelle v. Smith*, 451 U.S. 454 (1981) and *Batson v. Kentucky*, 476 U.S. 79 (1986). Pet. at 12, n.6. These cases were both decided after Chambers had been tried and convicted. *Id.* A prosecutor should not be faulted for failing to see changes in the law anymore than defense counsel. Without a doubt, Chambers's prosecutors would have wished to avoid any error in this case to see that justice for Mike McMahon might be served.

flaw in the jury instructions[.]"). As such, *Nelson*'s determination flies in the face of this Court's well-established precedent holding that jury-charge error is nearly always trial error and thus subject to a harm analysis. Pet. at 20-21. Second, merely because it arises in the context of a death-penalty case does not mean that it automatically gives rise to structural error. As this Court recognized in *Mitchell v. Esparaza*, "a number of our harmless-error cases have involved capital defendants[.]" 540 U.S. 12, 16-17 (2003) (per curiam) (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (unconstitutional admission of coerced confession at guilt stage); *Clemons v. Mississippi*, 494 U.S. 738 (1990) (unconstitutionally broad jury instructions at sentencing stage); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (unconstitutional admission of evidence at sentencing stage), and *Ring v. Arizona*, 536 U.S. 584, 609, n. 7 (2002) ("We do not reach the State's assertion that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict.")).

Importantly, this Court has just granted certiorari review in a case where the Court of Appeals for the Ninth Circuit held that a jury-charge error involving instructions on alternative theories of criminal liability was in fact structural, thus subject to automatic reversal. *Chrones v. Pulido*, 128 S. Ct. 1444 (2008). Like the appellate court in that case, the Fifth Circuit has created a potentially enormous exception to the mandate of *Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007), that is, that trial error is to be reviewed "under the 'substantial and injurious effect' standard set forth in *Brecht*," 127 S. Ct. at 2328. Under *Nelson*'s reasoning, anytime there is jury-charge error during the punishment trial of capital-murder trial, it could well be classified as structural, thus

abrogating *Fry* for simple instructional error. The concerns and purposes of federal habeas review demand that such cannot be left standing.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ERIC J. R. NICHOLS
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Postconviction Litigation Division

*ELLEN STEWART-KLEIN
Assistant Attorney General
Postconviction Litigation Division

* Counsel of Record

P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
Tel: (512) 936-1400
Fax: (512) 320-8132
Email:
ellen.stewart-klein@oag.state.tx.us

ATTORNEYS FOR PETITIONER